

EXXON CORP.

IBLA 87-117 Decided December 21, 1988

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, dismissing a protest of the appraised value of public land. W-86514.

Affirmed in part, reversed in part, and remanded.

1. Appraisals -- Federal Land Policy and Management Act of 1976:
Sales -- Public Lands: Appraisals -- Public Lands: Disposals of:
Generally -- Public Sales: Appraisals

Under the circumstances of this case it was proper for BLM to assign a highest and best use as "rural industrial" to remote lands upon which appellant was building a natural gas processing plant pursuant to a right-of-way. During the life of the right-of-way and prior to appraisal, appellant purchased two adjacent parcels at prices reflecting a rural industrial character, and the purchases were made for fair market value.

2. Appraisals -- Federal Land Policy and Management Act of 1976:
Sales -- Public Lands: Appraisals -- Public Lands: Disposals of:
Generally -- Public Sales: Appraisals

When determining fair market value of a Federal tract, those additional costs that a purchaser would normally incur when purchasing the land from the Federal rather than the private sector should be taken into consideration. This fact can be recognized by making a reasonable adjustment to the purchase price of comparable private tracts to reflect the fact that, in an open market, a purchaser will pay a lower purchase price for a tract of land if additional acquisition costs can reasonably be expected.

APPEARANCES: G. C. Lammey, Esq., Midland, Texas, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

By letter of April 8, 1986, Exxon Corporation (Exxon) protested a Notice of Realty Action (NORA) published by the Rock Springs (Wyo.) District

Manager, Bureau of Land Management (BLM). This NORA set forth the appraised value of certain public land in Lincoln and Sweetwater Counties, Wyoming, that Exxon seeks to purchase. On October 3, 1986, the Wyoming State Office, BLM, dismissed Exxon's protest, and this appeal followed.

Exxon seeks to purchase approximately 640 acres of public land for its Shute Creek natural gas processing plant. Sec. 14, T. 22 N., R. 112 W., sixth principal meridian, was recommended as the site for this plant in a May 1983 draft environmental impact statement (EIS) for the Riley Ridge Natural Gas Project. Public hearings on the EIS were then held and Exxon constructed a meteorological station in sec. 14. In November 1983, Exxon advised BLM that it desired to purchase the plant site acreage. BLM responded favorably in December 1983 but listed a number of procedures that had to be completed before BLM would initiate the sale of lands sought by Exxon. These steps included the completion of a cultural resource survey and preparation of a mineral report for the lands in sec. 14.

Eager to begin construction and recognizing that BLM's procedures were time consuming, in March 1984 Exxon sought a right-of-way from BLM for sec. 14 lands. After the grant of this right-of-way on May 1, 1984, Exxon commenced construction of the Shute Creek natural gas processing plant.

Meanwhile, in January 1984 Exxon approached Uinta Development Company (Uinta) to purchase a portion of sec. 13 immediately adjacent to and east of the sec. 14 plant site. On July 11, 1984, Exxon and Uinta entered into a 90-day option to purchase sec. 13 acreage at \$1,000 per acre.

Prior to construction, Exxon had also decided to extend its plant eastward into sec. 18, T. 22 N., R. 111 W., sixth principal meridian. This allowed Exxon to take electrical power from Pacific Power & Light Company in Sweetwater County. Sec. 18 is immediately adjacent to and east of sec. 13. In June 1984, Exxon sought a right-of-way from BLM to allow it to site its CO₂ compressors and electric substation in sec. 18. Shortly thereafter on July 23, 1984, Exxon applied to BLM to purchase the southernmost 160 acres in sec. 18.

Following a hearing, BLM granted a right-of-way in sec. 18 to Exxon on September 11, 1984. That same month Exxon exercised its option and Uinta conveyed 480 acres in sec. 13 to Exxon in consideration of \$1,000 per acre.

Because current market conditions indicated to Exxon that plant capacity would be economically feasible in the near term, Exxon sought additional lands in September 1984. It found these lands in the NE 1/4 sec. 19, immediately adjacent to and south of sec. 18. Uinta, the owner of this 160-acre tract, agreed to sell it for \$1,100 per acre, and this tract was conveyed to Exxon by warranty deed on April 3, 1985.

BLM appraised the public lands at issue as of April 16, 1985, which was subsequent to Uinta's sale of the above described parcels to Exxon. ^{1/} The NORA, published on February 28, 1986, at 40 FR 7135, set forth BLM's determination of the fair market value of these lands as \$640,000, or approximately \$1,000 per acre.

Exxon contends that the fair market value of the land stated in BLM's appraisal is too high and submits its own appraisal report which values the lands at \$54,700, or approximately \$85 per acre. Appellant contends BLM erred when determining the highest and best use of the appraised lands to be for rural industrial use. Exxon's appraisal is based on the fair market value of dry grazing land in the vicinity.

In Exxon's view, BLM's finding that the highest and best use of the Shute Creek plant site was rural industrial was due solely to Exxon's construction of an industrial facility on the site. Exxon maintains that the market for a particular use cannot be shown by referring solely to the intended use by the party seeking to acquire the land. In support of this view, Exxon quotes from the Uniform Appraisal Standards for Federal Land Acquisitions (Uniform Appraisal Standards) at page 17: "It is not fair the government be required to pay the enhanced price which its demand alone has created." ^{2/}

Appellant describes the plant site as remote and situated in a vast empty land. According to Exxon, only 1.15 percent of the lands within a 50-mile radius of the plant site have a nonagricultural use. Exxon notes that in order to construct its plant, it was required to seek and gain exceptions to existing zoning laws. In appellant's view, these facts cast doubt on BLM's finding that the subject lands have a highest and best use as rural industrial.

Exxon further charges that it was a "captive purchaser" of those lands sold by Uinta and that BLM improperly considered the sales of these properties to Exxon as comparable sales. At the time these sales were negotiated, appellant explains, Uinta was well aware of Exxon's need for additional land and the ongoing construction in sec. 14. Exxon states that it had no bargaining position and Uinta refused to negotiate regarding the sales prices.

^{1/} The public lands sought by Exxon total approximately 640 acres and occupy the S 1/2 N 1/2, S 1/2 sec. 14, T. 22 N., R. 112 W., sixth principal meridian, and lot 8, SE 1/4 SW 1/4, S 1/2 SE 1/4 sec. 18, T. 22 N., R. 111 W., sixth principal meridian.

^{2/} The quotation is taken from United States v. Cors, 337 U.S. 325, 333 (1949), a case involving condemnation by the United States. The Uniform Appraisal Standards, as its name suggests, deals with acquisitions by the United States, not sales. Its focus is, therefore, on just compensation. In regulation 43 CFR 2710.0-6(f), BLM is directed to use the Uniform Appraisal Standards when determining the fair market value of public lands to be sold. For a discussion of whether just compensation is necessarily equal to fair market value, see Northwest Pipeline Corp. (On Reconsideration), 83 IBLA 204, 215 (1984).

Appellant calls our attention to American Telephone & Telegraph Co., 77 IBLA 110, 115 (1983), wherein the Board acknowledged the uneven bargaining power could occur after a party had expended substantial sums on a specific site, thus reducing its freedom to locate elsewhere. ^{3/} The prices paid to Uinta (\$1,000 and \$1,100 per acre) reflect the "use value" ^{4/} of the parcels to Exxon, and this value must be excluded as an element of market value, Exxon contends.

Finally, Exxon charges error in BLM's failure to consider acquisition costs when arriving at fair market value. Appellant states that BLM required extensive archaeological excavation in secs. 14 and 18 to mitigate the impact on cultural resources. These mitigation efforts cost it \$870,000, Exxon declares, noting that this amount was far in excess of the \$10,600 it expended on the private lands purchased in sec. 13. Exxon suggests that a reduction in fair market value is warranted, citing Northwest Pipeline Corp., 65 IBLA 245 (1982).

Our resolution of this appeal begins with an analysis of section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1982). Section 203 authorizes BLM to sell public lands if certain conditions are met. Among these conditions is the requirement that "[s]ales of public lands shall be made at a price not less than their fair market value as determined by the Secretary." 43 U.S.C. § 1713(d) (1982).

Fair market value is the amount in cash, or on terms reasonably equivalent to cash, for which in all probability the property would be sold by a knowledgeable owner willing but not obligated to sell to a knowledgeable purchaser who desired but is not obligated to buy. Uniform Appraisal Standards at 3; 43 CFR 2710.0-6(f).

Exxon's appraisal was made as of April 1, 1984, ^{5/} which was prior to BLM's grant of the aforementioned rights-of-way, commencement of construction of the plant on right-of-way lands, and Exxon's purchases of nearby lands from Uinta. This choice of a valuation date is consistent with Exxon's view that the market for the subject lands cannot be determined by referring solely to the intended use of such lands.

We agree that the market, i.e., the highest and best use, of the subject lands cannot be shown by referring solely to Exxon's intended use. Highest and best use is defined in the Uniform Appraisal Standards at page 7 to mean

^{3/} In that case, the Board excluded use of private lease renewals in determining the fair market value of a transmission site right-of-way based on a comparable lease analysis.

^{4/} Appellant states: "If the buyer makes investments in a specific site and economically cannot choose among alternatives available in the market, then the purchase price for land associated with his specific need is more likely related to 'use value' or 'value in use' than a price based on fair market value in a free market" (Statement of Reasons, Nov. 28, 1986, at 15).

^{5/} Appraisal Report of Michael C. Johnson at 1.

either some existing use on the date of taking, or one which the evidence shows was so reasonably likely in the near future that the availability of the property for that use would have affected its market price on the date of taking and would have been taken into account by a purchaser under fair market conditions.

Thus, Exxon's announcement of its intent to build a natural gas processing plant would not, by itself, cause a change in the highest and best use of the plant site lands. American Telephone & Telegraph Co., supra at 114.

[1] We do not agree, however, that this principle requires BLM to ignore the commencement of construction and two nearby sales in appraising the lands at issue. 6/ In April 1984, Exxon obtained a conditional use permit from Lincoln County authorizing construction of a plant not otherwise permitted by zoning regulations. 7/ When, after the commencement of construction and the County's grant of the conditional use permit, Exxon negotiated with Uinta for the purchase of land in nearby secs. 13 and 19, Uinta could reasonably expect to receive compensation for the sale of its land based on the current market price for industrial lands. See Pacific Power & Light Co., 65 IBLA 50, 54 (1982).

There can be little doubt that, as a result of Exxon's prior commencement of construction in sec. 14, Uinta had leverage when dealing with Exxon. However, Exxon does not establish overreaching on Uinta's part by pointing to the disparity between Uinta's sales prices (\$1,000 per acre for sec. 13 and \$1,100 per acre for sec. 19) and the sales price of nearby grazing land (\$85 per acre). Uinta was not selling remote grazing land -- Exxon's actions prior to the sale of the Uinta lands had changed the character of these lands. Exxon has not submitted evidence that demonstrates that Uinta's lands were sold for other than the fair market value of rural industrial land.

In April 1985, when all of the prerequisite action was taken and BLM was able to appraise the subject lands for sale, Exxon's purchases from Uinta had been completed. To maintain, as does appellant, that the United States should have appraised the subject lands as having a highest and best use for grazing ignores the fact that the highest and best use of the land changed when Exxon commenced construction of its natural gas processing plant and purchased the lands immediately adjacent to it at rural industrial site prices. A failure to recognize these facts would be contrary to the

6/ In its appraisal report, BLM relied primarily upon three sales that it deemed comparable. Two of these sales are Exxon's purchases from Uinta, discussed above. The third sale involved a 280-acre parcel of rural industrial land, 50 miles east of the subject lands. The sale price was \$900 per acre (BLM Appraisal Report at 9). Eighteen additional sales are identified by BLM as "supportive sales."

7/ Affidavit of Thomas J. Tibbitts, May 23, 1986. This affidavit is found at page 248 of the case record.

provisions of section 203 which requires payment for the lands at no less than fair market value.

[2] Although we reject Exxon's argument that BLM wrongly appraised the subject lands for a rural industrial use, we find merit in Exxon's contention that the extensive costs attributable to the required cultural resource survey, e.g., archaeological costs, should have been considered when arriving at fair market value. As noted above, Exxon spent \$870,000 in performing this task on lands purchased from BLM; its obligations on the private lands purchased totalled only \$10,600.

In Northwest Pipeline Corp., *supra* at 253, set aside on other grounds, Northwest Pipeline Corp. (On Reconsideration), 77 IBLA 46 (1983), the Board noted that BLM makes certain adjustments when arriving at fair market value because of the disparities in private and public grants. Thus, BLM has acknowledged that a public right-of-way (for a natural gas pipeline) is inferior to a private right-of-way in several ways, including:

- A. Tenure.
- B. Right to reappraise every five years.
- C. Annual payments.
- D. More restrictive land rehabilitation requirements in some cases.
- E. Right of revocation.
- F. Right to require changes in line if land is needed for a public project.
- G. Right to authorize other grants over the same right-of-way (some private rights-of-way are comparable in this respect).
- H. Longer time delay in some cases.
- I. Archaeological inventory and environmental review requirements.
- J. Reimbursement of administrative costs. [Emphasis supplied.]

See also Gas Company of New Mexico, 88 IBLA 240, 246 (1985). BLM has in the past reduced the industry's going rate for rights-of-way on private lands by 30 percent when determining fair market rental value. 8/

8/ As noted above, these decisions of BLM have been set aside by the Board because of inconsistencies in BLM appraisal practice. See Northwest Pipeline Corp. (On Reconsideration), 77 IBLA 46 (1983), and recent rulemaking at 43 CFR Subpart 2803.

BLM's refusal to consider an adjustment based upon those additional costs routinely incurred by a prospective purchaser of Federal land as a result of additional burdens imposed by statute and regulations, such as the cultural resource survey, was in error. The knowledge that additional costs will normally be incurred is a real factor which affects the amount a knowledgeable purchaser would be willing to pay for a tract of Federal land just as the additional costs to clear and level a tract of land would result in a lower fair market value when compared to a clear and level tract. Thus, when determining fair market value of a Federal tract, those additional costs that a purchaser would normally incur when purchasing land from the Federal rather than the private sector should be taken into consideration. This fact can be recognized by making a reasonable adjustment to the purchase price of comparable private tracts to reflect the fact that, in an open market, a purchaser will pay a lower purchase price for a tract of land if additional acquisition costs can reasonably be expected.

On remand, BLM shall consider the effect of the additional expenses which must be incurred by a purchaser of Federal lands on the fair market value of those lands when determining the sales price by analysis of sales of comparable private lands.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office is affirmed in part and reversed in part, and the case file is remanded to BLM for further action consistent with this decision.

R. W. Mullen
Administrative Judge

I concur:

John H. Kelly
Administrative Judge.

